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In the Supreme Court of the United States

OCTOBER TERM, 1939

INTERNATIONAL ASSOCIATION OF MACHINISTS, TOOL & DIE MAKERS LODGE NO. 35, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AND PRODUCTION LODGE NO. 1200, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 732

INTERNATIONAL ASSOCIATION OF MACHINISTS, TOOL & DIE MAKERS LODGE NO. 35, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AND PRODUCTION LODGE NO. 1200, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 733–755) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 667–702) are reported in 8 N. L. R. B. 621.

JURISDICTION

The decree of the court below (R. 756) was entered on November 20, 1939. The petition for a writ of certiorari was filed on February 17, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence supporting the Board's findings that the I. A. M. was assisted by unfair labor practices of the employer prior to its entering into a closed-shop contract with the employers, so as to render the contract invalid under the proviso to Section 8 (3) of the Act.

2. Whether in the circumstances of this case the Board acted arbitrarily in finding that a unit comprising most of the employer's production employees, including those in a toolroom, was an appropriate one for collective bargaining purposes within the meaning of Section 9 (a) and (b) of the Act.

3. Whether it was an abuse of discretion in the circumstances of this case for the Board, upon findings that the employer had refused to bargain collectively with a labor organization designated by a majority of the employees in the appropriate unit, to require the employer to bargain with that labor

organization despite a claim, submitted to the Board shortly prior to issuance of its order, that another labor organization then represented a majority of the employees in the appropriate unit.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 24–27.

STATEMENT

Pursuant to charges and amended charges filed by the United Automobile Workers of America, Local No. 459 (R. 454–459), a labor organization hereafter called the U. A. W., the National Labor Relations Board, by its Regional Director at Indianapolis, Indiana, issued a complaint against The Serrick Corporation, hereinafter called the Company, on October 5, 1937 (R. 447–453).[1] The complaint, as thereafter amended (R. 468–469, 481, 493–499), alleged that the Company had engaged

[1] The U. A. W. also filed a petition under Section 9 (c) of the Act for the investigation and certification of representatives (R. 462–463), which, as amended, alleged that the unit appropriate for collective bargaining purposes consisted of all of the Company's employees, exclusive only of the buffers and metal polishers, foremen, supervisory officials, and office employees engaged in clerical work. On September 27, 1937, the Board directed such investigation to be held, and consolidated the petition for purposes of hearing with the proceedings arising out of the charges of unfair labor practices filed by the U. A. W. (R. 465–466).

and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act.

Copies of the complaint were served upon petitioner International Association of Machinists, hereinafter called the I. A. M., upon the Company, and upon the U. A. W. (R. 459–460). The Company filed an answer, denying that it had engaged in the unfair labor practices alleged.

Pursuant to notice, a hearing was held in Muncie, Indiana, from October 18 through November 15, 1937, before a Trial Examiner of the Board. The Company and the U. A. W. were represented by counsel, while petitioners appeared by their Grand Lodge representative. All participated in the hearing.

On March 4, 1937, the Trial Examiner filed his Intermediate Report, finding that the Company had engaged in part of the unfair labor practices alleged, but recommending, insofar as is here material, dismissal of that part of the complaint which alleged that the discharge of certain named toolroom employees for their refusal to join the I. A. M. violated Section 8 (3) of the Act. The Trial Examiner took the position that a closed-shop contract between the Company and petitioner Lodge No. 35 of the I. A. M. constituted a valid reason for these discharges (R. 648–652, 663–664). The U. A. W. filed exceptions to the report (R. 664–665). None of the parties requested oral argument before the Board, although advised of their

right so to do (R. 666). On July 27, 1938, the Board rendered its decision, setting forth its findings of fact, conclusions of law, and order (R. 667–702).

The findings of the Board with respect to the unfair labor practices and the appropriate unit are detailed under Points I and II, respectively, of the Argument (*infra,* pp. 8–20). In brief outline, the Board found that the Company, by assisting the I. A. M. and opposing the U. A. W. and by other acts, had interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8 (1) of the Act (R. 695–696, 698); that the Company's discharge of 18 toolroom employees because of their failure to join the I. A. M. was in violation of Section 8 (3) of the Act, for the reason that the closed-shop contract, pursuant to which the discharges occurred, was illegal under the proviso to that section in that (a) it was made with a labor organization "assisted" by unfair labor practices, and (b) the toolroom, the unit covered by the contract, was not an appropriate unit for collective-bargaining purposes under the circumstances of this case (R. 675–686); that at all times after August 10, 1937, the Company, contrary to Section 8 (5) of the Act, refused to bargain collectively with the U. A. W., although that organization represented a majority of its employees in an appropriate unit, which the Board found consisted of all of the employees at the Company's Muncie plant, in-

cluding toolroom employees, but excluding buffers and polishers, supervisors, and office employees engaged in clerical work (R. 688–695); and that the Company, in violation of Section 8 (2) of the Act, had from December 1936 to September 16, 1937, dominated and interfered with the administration of, and had contributed support to, a labor organization of its employees known as the Acme Welfare Association.

Upon the basis of these findings, the order of the Board (R. 698–702) requires the Company to cease and desist (1) from giving effect to its closed-shop contract with the I. A. M., provided, however, that the Company is not precluded from hereafter entering into such a contract with the I. A. M. or any other labor organization if such labor organization is the authorized representative of the employees in an appropriate unit, as provided in Section 9 (a) of the Act, and has not been assisted by any unfair labor practices; (2) from refusing to bargain collectively with the U. A. W. as the exclusive representative of its employees in the unit found by the Board to be appropriate; and (3) from its various other unfair labor practices. As affirmative action designed to effectuate the policies of the Act, the Board ordered the Company to reinstate with back pay the toolroom employees discriminatorily discharged and to post and maintain appropriate notices.[2] Shortly after the order was issued the

[2] Having found, as part of the case arising upon the charges filed under Section 10 (b) of the Act, that the

Company formally notified the Board that it had complied and would comply fully with its terms (R. 703–709).

On September 29, 1938, petitioners filed in the court below a petition to review and set aside the Board's order (R. 1–7). The petition to review attacked only those portions of the order (paragraphs 1 (d) and 1 (e), R. 99), requiring the Company to cease and desist (1) from giving effect to its closed-shop contract with the I. A. M.; and (2) from refusing to bargain collectively with the U. A. W. as the exclusive representative of its employees in the unit found to be appropriate (R. 7).[3]

U. A. W. was the accredited representative of the employees in an appropriate unit, it was unnecessary for the Board to act upon the petition which had been filed by the U. A. W. under Section 9 (c) of the Act for certification of representatives. The petition was, therefore, dismissed by the Board (R. 697). Petitioners erroneously characterize, and in some respects treat, the Board's finding and order in the proceeding under Section 10 (b) as a certification of the U. A. W. under Section 9 (c) (Pet. 6, 7, 26–33). Compare *National Labor Relations Board* v. *The Falk Corporation*, No. 460, this Term, decided January 2, 1940; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers et al.*, No. 253, this Term, decided January 2, 1940; *American Federation of Labor et al.* v. *National Labor Relations Board*, No. 70, this Term, decided January 2, 1940.

[3] Petitioners and the Board stipulated (R. 728–730) in general effect that the facts found and inferences drawn by the Board basic to those parts of its order review of which was not sought were "fully established and conclusive" because "amply supported by substantial and competent evidence," and that the court below should so treat them.

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The Board answered praying that the petition to review be denied (R. 17–20).

On November 20, 1939, the court below rendered its decision (R. 733–755) affirming the order of the Board. On that date, a decree was entered accordingly (R. 756).[4]

ARGUMENT

I

THE FINDING OF THE BOARD THAT THE I. A. M. WAS "ASSISTED" BY THE UNFAIR LABOR PRACTICES OF THE COMPANY IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The Board found (R. 684–685) that the I. A. M. was assisted by the Company's unfair labor practices, within the purview of the proviso to Section 8 (3) of the Act (*infra*, pp. 24–25), which renders invalid any closed-shop contract made with an organization so aided. Accordingly, the Board held that the toolroom contract was invalid and ordered the Company to cease giving effect to it (R. 699). The court below upheld the Board's findings and order (R. 750, 752).[5]

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[4] The effect of the decree is merely to deny the petition to review. The Board did not request enforcement against the Company or make it a party.

[5] The Board also held the toolroom contract invalid upon the additional ground that the toolroom was not an appropriate bargaining unit at the time the contract was made (R. 685, 689). Under Point II (*infra*, pp. 15–20), we show that the Board's finding upon the unit question was not arbitrary, and that the court below properly sustained it. Ac-

In the court below petitioners stipulated that the bulk of the findings relating to the Company's unfair labor practices were correct (R. 728–730), and petitioners now challenge (Pet. 7, 8, 12, 13–18) the sufficiency of the evidence only in respect of the finding that four employees active in the I. A. M. campaign during the period immediately preceding the execution of the toolroom contract were supervisors. But this narrow attack reaches only a small segment of the pertinent findings; as the court below said (R. 738) "The toolroom episode was merely one phase of a plant-wide controversy lasting from May to October" and the events in the toolroom were but "integral parts" of "the general contemporaneous current."

The following findings are either conceded or unattacked.[6] Prior to the appearance of the U. A. W., the Company maintained in its plant an "inside" employees Association whose president was the Company's personnel director, Lewis (R. 673, 676). In the early spring of 1937 Lewis and

cordingly, aside from the fact that neither finding raises a question worthy of review, petitioners could not obtain a reversal as to the toolroom contract unless they could establish that there was insufficient support for both findings basic to the contract's invalidity.

[6] Reference is made in the following recitation of the Board's findings to certain individuals employed in the toolroom named Fouts, Shock, Bolander, and Dininger. That the conduct of those individuals was as stated in the findings, is conceded or not now questioned; petitioners do question whether they were properly found to occupy supervisory positions, a matter considered *infra*, pp. 14–15.

Works Manager Poole urged the employees to use the Association as their representative rather than resort to an "outside" labor organization (R. 673, 676). In May 1937, the Association activity was intensified to resist U. A. W. organizational activity at the plant (R. 673–674). At an Association meeting about June 1, Lewis warned the employees against the C. I. O.[7] "invasion" and called for a rising vote of adherence to the Association (R. 674, 677–678); Lewis contemporaneously advised the Association committeemen that "we don't want the C. I. O. in this plant" and that the Company had that organization's meetings under surveillance (R. 676). Thereupon a widespread drive for membership in the Association and in opposition to the U. A. W. took place, participated in by supervisors and ordinary employees upon company time and property and marked by threats of discharge, and discharges, of those who refused to join (R. 674, 677).

Particular emphasis in this campaign was placed upon the toolroom (R. 674, 678). Lewis assigned to Sharpe, Association committeeman for the toolroom, the task of persuading the employees there to join the Association (R. 674). McCoy, the toolroom foreman, encouraged Sharpe (R. 678). Despite the Company's efforts to build the Association into an effective instrument to block the U. A. W.,

[7] The U. A. W. is affiliated with the Congress of Industrial Organizations (R. 672).

the Association failed to secure the adherence of the bulk of the employees (R. 678).

With the decline of the Association by mid-July, Shimer, the night superintendent of the plant and Shock, an employee in the toolroom who had favored the Association and whom the Board found was a supervisor, reported to the toolroom employees that the Company would not recognize the C. I. O. but would recognize an A. F. of L. union (R. 678–679). Coincidentally one Fouts, who had actively supported the Company's drive in behalf of the Association and whom the Board found was a supervisor (R. 673–674, 680), accompanied by two other toolroom employees named Byroad and Baker, laid before Shock a proposal to organize a union of toolmen to be affiliated with the A. F. of L. (R. 679). Following Shock's pledge to cooperate, Byroad polled some, but not all, of the toolroom employees, and it was announced that 80 percent of the toolroom employees favored an A. F. of L. organization (R. 679).

Fouts and Shock then sent Byroad to communicate with an I. A. M.[8] organizer who held a meeting on July 28 at which 34 out of 63 toolroom employees signed I. A. M. application cards (R. 679). Following this meeting, Fouts engaged in intensive solicitation on behalf of the I. A. M. (R. 680) in the presence of McCoy, the ranking supervisory

[8] The I. A. M. is affiliated with the American Federation of Labor (R. 672).

official in the toolroom (R. 681). Dininger and Bolander, who the Board found were foremen in the toolroom, joined the I. A. M. and lent their support to its membership drive (R. 680–681). Fouts stated to various toolroom employees that the purpose of this drive was to repel the U. A. W., and threatened them with loss of their jobs if they did not join the I. A. M. (R. 680). Personnel Director Lewis inquired of two employees why they had not joined and advised them to have but "one organization in here" (R. 681). Ordinary employees likewise engaged in I. A. M. solicitation upon working time under circumstances which the Board found compelled the conclusion that Foreman McCoy knew and approved of their efforts (R. 681–682).

On August 3 the I. A. M. organizer presented to Works Manager Westlund a form of contract covering the toolroom employees and containing a variety of proposals; after some discussion, Westlund agreed to all provisions but those concerning the closed-shop and hours of work (R. 682). At a second conference that afternoon, Shock, acting as spokesman for the I. A. M., advised Murphy, the Company's vice president and general manager, that the purpose of the contract was to "keep the C. I. O. out of the toolroom" and that "after the trouble was settled" the Company "could tear up the contract" (R. 682–683). On August 11, the contract (which was dated back to August 6) was signed (R. 684). On August 13 all toolroom em-

ployees who declined to apply for I. A. M. membership, 18 in number, were discharged (R. 684, 686).

On August 10 and thereafter, the Company refused to bargain with the U. A. W. (R. 690–695). In the course of these negotiations, the Company distributed to the employees a circular taking note of a feeling of dissatisfaction and unrest, attributing this to "outsiders," hinting that the plant might be closed, urging the employees not to be fooled by the "promises" of "strangers," and declaring the Company's intention not to deal with "irresponsible organizations" (R. 691–692). Simultaneously, the I. A. M. began a campaign, assisted by foremen and other supervisory employees in the production departments, to organize the production workers (R. 695–696). On August 21, one U. A. W. production employee, after being warned by her foreman to "join up with the Company or the A. F. of L." was discharged because of her U. A. W. membership (R. 687).

This synopsis of the main outlines of the uncontested findings demonstrates the full extent to which the I. A. M. was assisted by the Company's unfair labor practices.* There is, therefore, no oc-

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*The court below, after reviewing the circumstances recited above, said (R. 743):

"This mere recital of principal events disclosed sufficiently the employer's determined purpose, never relaxed, to have nothing to do with the U. A. W. and to use the I. A. M. to keep U. A. W. out of the toolroom and the plant."

casion presented for a review of the sufficiency of the evidence to support the Board's findings that Fouts, Shock, Bolander, and Dininger were supervisory employees in the toolroom; those subsidiary findings plainly are not essential supports of the Board's ultimate conclusion and fall far short of raising a question worthy of review. *National Labor Relations Board* v. *National Licorice Co.*, No. 272, this Term, decided March 4, 1940; *National Labor Relations Board* v. *The Falk Corporation*, No. 460, this Term, decided January 2, 1940; *National Labor Relations Board* v. *Waterman Steamship Corp.*, No. 193, this Term, decided February 12, 1940. There is, moreover, ample evidence that these men were possessed of authority to direct employees in their work, coupled with the power to recommend for hire and discharge; and that, having engaged in activities to establish a labor organization favored by the Company (both in respect of the Association, and, when that failed, the I. A. M.) they were regarded by the employees as management representatives (R. 680–681; 42, 54, 73, 77, 89, 90, 99, 104, 120, 165, 307, 309, 358).[10] The court

[10] Petitioners claim (Pet. 8, 16) that the Board stipulated at the hearing that Fouts, Shock, Bolander, and Dininger were not supervisory employees. Examination of the stipulation (R. 483–492) indicates that its purpose was to reflect the names and status of employees as listed and classified by the Company upon its pay roll. Such a stipulation did not prevent the Board from showing that employees not listed by the Company upon its records as supervisors nevertheless enjoyed a supervisory status, and the fact that this inquiry was made at the hearing clearly indi-

concluded that "the evidence here sustains the Board in finding that the active organizers, Fouts, Shock, Bolander, *et al.*, had supervisory capacity but independently of that it also sustains the ultimate finding that they acted for and on behalf of the employer" (R. 751).

II

THE BOARD'S DETERMINATION CONCERNING THE APPROPRIATE UNIT WAS NOT ARBITRARY

The Board's complaint in the unfair labor practice case alleged that the U. A. W. had requested the Company to bargain with it as majority representative of the employees in the plant unit, including the toolroom employees, that the Company had refused to do so, and that the refusal violated Section 8 (5) of the Act (R. 452–453). Consequently, the Board was called upon to decide whether the Company had engaged in the unfair labor practice charged, and in that connection to determine, upon the record made at the hearing, whether the unit alleged in the complaint was one appropriate for collective bargaining purposes. The Board found that it was (R. 689).

The Board's determination rests upon two principal bases. The first of these is that the Company had coerced the toolroom employees to join the I.

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cates that the stipulation was so understood by the parties. The court below, in which petitioners strongly pressed this same claim, appears to have rejected it in pointing out (R. 748) that these four employees "had actual, though not officially nominal, supervisory capacity."

A. M. toolroom lodge by unfair labor practices, so that their action in joining that lodge could not be regarded as a free expression of their desire for a toolroom unit. Accordingly, the Board held that this case presented no occasion for application of the general principle, theretofore followed by the Board in making unit determinations, of following the wishes of the craft employees themselves where a conflict exists between a craft and a larger unit and other considerations are equally balanced."[11]

This view of the Board is manifestly reasonable; the Board should not give effect to units whose ostensible choice by employees is the result of their employer's coercive practices, any more than it should recognize representatives whose selection is the product of such practices. *Cf. National Labor Relations Board* v. *National Licorice Co.*, No. 272, this Term, decided March 4, 1940. Petitioners assert (pp. 22–24) that a choice so coerced and interfered with must nevertheless be given paramount weight, lest employers, by favoring unwilling unions, dictate or destroy units otherwise appropriate. That did not happen here, and a speculation that the Board is not equipped to uncover and deal with such attempts when made

[11] This is the so-called Globe doctrine, announced in *Matter of Globe Machine and Stamping Co.*, 3 N. L. R. B. 294. For a discussion of it in greater detail see Third Annual Report of the National Labor Relations Board (1938), pp. 167–174.

affords no basis for attacking an obviously correct determination in this case.[12]

Nor is there merit in the argument (Pet. 7, 23) that the Board's refusal to designate a unit which resulted from the Company's unfair labor practices is punitive against the craft union and serves to "destroy" the craft unit. Aside from the fact that no one may demand recognition of a status obtained through a denial of rights guaranteed by public statute (*National Labor Relations Board* v. *National Licorice Co., supra*), the claim ignores the representation provisions of the Act (Section 9) which remain available for the determination of units and representatives preferred by employees of their own free will.[13]

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[12] Petitioners state (Pet. 23) that in all other like cases the Board has merely ordered the employer to cease and desist from his unfair labor practices and has directed an election, to be held after the effects of the unfair labor practices have been dissipated. This assertion is incorrect. Petitioners apparently refer to that particular class of cases in which a complaint of unfair labor practices not involving a refusal to bargain has been consolidated with a petition for certification of representatives, and an election, necessary in the representation proceeding because of lack of proof of majority, is postponed until conditions indicate that a free choice is possible. See *National Labor Relations Board* v. *The Falk Corporation*, No. 460, this Term, decided January 2, 1940. Such cases have no pertinence here, nor has the Board ever decided a case, substantially similar in its facts, in conflict with the instant one.

[13] The Board made this perfectly clear in attaching to the provision of its order (paragraph 1 (d)) requiring the Company to cease giving effect to the toolroom contract the following proviso (R. 699): "providing, however, that noth-

In addition to the foregoing basis for the Board's holding that the larger unit was, and the toolroom was not, an appropriate bargaining unit, two members of the Board were of opinion that, since the I. A. M. was organizing both toolroom and production employees (although in separate lodges), and since there was functional interdependence and close integration between the toolroom and the remainder of the plant, the I. A. M. was "in direct competition with the U. A. W., which was organizing on an industrial basis. Therefore, the I. A. M. cannot be heard to maintain that the craft unit is appropriate." (R. 689.) Petitioners argue (pp. 24–26) that this holding constitutes a probe into and interference with their internal affairs, which this Court should correct. This contention is manifestly untenable. The Board was not inquiring into the internal affairs of petitioners in any effort to assert control over those affairs, but was merely taking cognizance of the methods of organization pursued by the competing unions; the form self-organization has taken is a factor which casts significant light upon the wishes of employees as to the ap-

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ing in this Order shall preclude the respondent from hereafter making an agreement with International Association of Machinists, or any other labor organization (not established, maintained, or assisted by any action defined in the National Labor Relations Act as an unfair labor practice) requiring, as a condition of employment, membership therein, if such labor organization is the representative of the employees in an appropriate bargaining unit as provided in Section 9 (a) of said Act;".

propriate unit.[14] The Board was entitled to give weight to this factor, just as it was warranted in attaching significance to the related consideration that the U. A. W. had substantial membership among the toolroom employees (R. 689).[15] It is undeniable that the numerous factors which may be relevant from case to case,[16] and the determination of their relevance and the weight to be attached to them, pose a difficult problem for the Board. But the Act requires that unit determinations be made, and any such decision may be overturned only if the Board's judgment lacks any reasonable basis.[17] The Board's determination of the appro-

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[14] See Third Annual Report of the National Labor Relations Board (1938), Chap. VII, pp. 163–167.

[15] The statement in the petition (p. 22) that the Board did not consider the U. A. W. membership in the toolroom, or the functional relationship between the toolroom and the remainder of the plant (*supra*, p. 18), is thus incorrect, as the opinion of the court below further shows (R. 752).

[16] For a description of their wide extent see Third Annual Report, *op. cit. supra*, Chap. VII, pp. 156–197.

[17] *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 819 (C. C. A. 8); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 143 (C. C. A. 9), certiorari denied, 304 U. S. 575. See also, *Brotherhood of Ry. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.); *Association of C. E. of A., T. & S. F. Ry. System* v. *Brotherhood of Ry. and S. S. Clerks*, 85 F. (2d) 152, 157 (C C. A. 7); *Nashville, C. & St. L. Ry.* v. *Ry. Employees' Dept.*, 93 F. (2d) 340, 342 (C. C. A. 6), certiorari denied, 303 U. S. 649; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485; *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U S. 304. 314.

priate unit in this case was not arbitrary, and in any event does not present a question of importance calling for review by this Court.

III

THE BARGAINING ORDER WAS PROPER

Petitioners urge (Pet. 7, 8, 12, 26–33) that the Board erred in issuing, and the court below in enforcing, the order requiring the Company to bargain with the U. A. W., because an affidavit of an I. A. M. representative and a letter from its counsel (R. 12–17), submitted to the Board several months after the hearing, advanced the claim that the I. A. M. then represented a majority of the production workers. Petitioners contend that the Board abused its discretion in requiring the Company to bargain with the U. A. W. without "at least" launching an investigation of the claim so advanced (Pet. 7, 26–33).[18] The argument is that, while the U. A. W. was admittedly the accredited representative of a majority of the employees at

[18] Petitioners seriously misrepresent the facts in asserting (Pet. 6, 27–28) that the bargaining order issued despite an agreement between the parties to this case for an election. The U. A. W. and the company were the only parties to the sole agreement ever executed (R. 473–474), and that agreement merely terminated the U. A. W. strike pending an election "at such time" as the Board might determine. As the Board held (R. 694), no election was ever necessary since the stipulation at the hearing established the U. A. W. majority. The other agreements in evidence (R. 474–476, 476–478) were never completely executed because of the successive objections of the company and the I. A. M. as explained in the Board's decision (R. 693–695).

the time of the Company's refusal to bargain (R. 490–491), and while petitioners made no showing at the hearing of any majority shift in the period following the refusal to bargain, the order to bargain was nevertheless rendered improper by the unproved assertion to the Board, on the eve of its decision, that the U. A. W. had been repudiated as majority representative.

The decision below rejecting this contention (R. 735) is in accord with the decisions of four other Circuits. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6), certiorari denied, No. 105, this Term; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 98 F. (2d) 18 (C. C. A. 9). It is in probable conflict with the decision of the Eighth Circuit in *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, unless weight be attached to the fact that in that case the organization alleging a change in representation intermediate the hearing and the order had requested the Board, prior to its decision, to reopen the proceedings and take evidence upon the claim.[19]

It is the position of the Board that the *Hamilton-Brown* case is erroneous, and that the decision

[19] Petitioners here did not seek a further hearing in support of their assertion of changes in union adherence, either before the Board or by motion in the court below in accordance with Section 10 (e). The court below was of the view that this remedy should have been exhausted (R. 735).

Tightly Bound

of the court below is clearly correct. The Board is so arguing in *National Labor Relations Board et al.* v. *Bradford Dyeing Association* (*U. S. A.*), No. 588 this Term, certiorari granted January 15, 1940, set for argument during the week of March 25, 1940. In its brief in that case the Board presents (pp. 39-60) in detail the considerations it believes relevant to the general question of the propriety of enforcing bargaining orders without regard to possible changes in or loss of representation following a refusal to bargain. In broad outline, those considerations are that: it is necessary and proper to require an employer to recognize and negotiate with the representative with whom he refused to deal in violation of the Act, regardless of possible change in union adherence subsequent to the refusal to bargain, first, in order to dissipate the coercive effects of the unfair labor practices by restoring the right denied the employees and thus to effectuate the Act's fundamental purpose of insuring collective bargaining under free conditions; and, second, in order that the collective-bargaining provisions of the Act shall not be rendered unworkable and unenforceable by the necessity for repeated investigations of new claims of changes in majority.

By its disposition of the *Bradford Dyeing Association* case, the Court will in all probability determine the propriety of the bargaining order in the present case, and the other questions here presented plainly do not warrant the granting of the petition. Accordingly, if the Court believes that

the question as it arises in this case is one which ordinarily might warrant review, the Board requests that action on the petition in this case be delayed until decision of the *Bradford Dyeing Association* case, and that the petition then be disposed of in the light of the decision in that case.

CONCLUSION

The first two questions raised in the petition clearly are not worthy of review in any event. Since the third question will shortly be argued before the Court in the *Bradford Dyeing Association* case it is respectfully requested that, if the Court believes that the question as it arises in this case is one warranting review, action on the petition in this case be delayed until that case is decided and that the petition then be disposed of in the light of the decision in that case.

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MARCH 1940.

APPENDIX

The relevant provisions of the National Labo Relations Act (Act of July 5, 1935, c. 372, 49 Stat 449, U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are as follows:

SECTION 7. Employees shall have the righ to self-organization, to form, join, or assis labor organizations, to bargain collectivel through representatives of their own choos ing, and to engage in concerted activitie for the purpose of collective bargaining o other mutual aid or protection.

SECTION 8. It shall be an unfair labo practice for an employer—

(1) To interfere with, restrain, or coere employees in the exercise of the rights guar anteed in section 7.

(2) To dominate or interfere with th formation or administration of any labo organization or contribute financial or othe support to it * * *.

(3) By discrimination in regard to hir or tenure of employment or any term or con dition of employment to encourage or dis courage membership in any labor organiza tion: *Provided,* That nothing in this Act, o in the National Industrial Recovery Ac (U. S. C., Supp. VII, title 15, secs. 701–712) as amended from time to time, or in any cod or agreement approved or prescribed there under, or in any other statute of the Unite States, shall preclude an employer fro making an agreement with a labor organiza tion (not established, maintained, or assiste

by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of

this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SECTION. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatment of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any

district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restaining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or ageney, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

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